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In the Supreme Court of the United States

OCTOBER TERM, 1975

E. J. LEE & LEE BOATS, INC.,
Petitioners,

versus

VENICE WORK VESSELS, INC., ET AL.,
LEANDER H. PEREZ, JR.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners have altered the question presented for decision. The United States Court of Appeals for the Fifth Circuit properly stated the question presented as:

> "The question for determination in this case, before this Court on an interlocutory appeal for which leave was granted, is whether a private cause of action for treble damages under the antitrust laws survives against the heirs of an alleged wrongdoer, where the suit was instituted long after the decedent's death and after his estate had been administered and distributed among his heirs and the administrator of his

estate had been released."

Lee v. Venice Work Vessels, Inc., 512 F. 2d 85.

If this Honorable Court were to grant certiorari, there would be an additional question presented to this Court. That question is whether a federal civil antitrust action abates upon the death of the alleged "wrongdoer" when neither he nor his estate benefitted by such action. The Court of Appeals did not have to reach this question and did not.

STATEMENT OF THE CASE

The United States Court of Appeals for the Fifth Circuit properly summarized the facts relative to the issues. In addition to those facts quoted by petitioners in their STATEMENT OF THE CASE, the Court of Appeals noted additional facts which were important in its determination. These facts dealt with petitioners' complete inattention to "the exercise of their rights". The father of respondent died on March 19, 1969 and his estate was promptly opened with Letters of Administration being issued on April 24, 1969. Two years and seven months later, on November 24, 1971, the Administrator was released and the heirs placed in possession. Petitioners' complaint against Leander H.. Perez, Jr. as Administrator of the Estate of Leander H. Perez, Sr. was not filed until December 29, 1972. During this period of time, petitioners did not file any claim against the estate. The Court of Appeals found on Page 87 as follows:

"The appellees were aware both of the suit by the United States and of the death of Perez, Sr. . . . Appellees filed no claim in the administration of the estate nor did they oppose the release of the Administrator. Their suit against the Administrator some thirteen months after his release indicates the degree of appellees' inattention and their unwarranted assumption that the administration of the estate was still in progress, though a simple search of the appropriate state court record would have disclosed otherwise. Appellees' persistent failure to exercise their claimed rights despite ample opportunity justifies neither their claim of inherent unfairness nor warrants an extension of the survival of their cause of action beyond the Administrator to the heirs."

ARGUMENT

The decision of the Court of Appeals has not departed from the accepted and usual course of judicial proceedings and petitioners' claim of conflict of decisions is spurious. Petitioners cite *Rogers v. Douglas Tobacco Board of Trade*, 244 F. 2d 471 (5th Cir. 1957), as authority for such departure and conflict. The court below stated that such case "held that a private antitrust action survived against the personal representative of a defendant who died after service of process upon him". The Court further stated that that "decision deals with the death of a defendant against whom an action is already pending". The title of the case clearly shows that it was a proceeding

against the Administrator and Administratrix of the estate of the deceased defendant.

The *Rogers* case and all of the other cases cited by petitioners were not complaints initially filed against an heir. All of those cases dealt with substitution of the personal representative of a deceased defendant.

Petitioners only cite one authority that was not cited to the Court of Appeals and that is the case of *DeSylva v. Ballentine*, 35 U.S. 570, 100 L.Ed. 1415, 76 S.Ct. 974. (1956).

Petitioners contend that that case is authority for using the state law of Louisiana to permit them to sue an heir in the federal court on a federal cause of action. *DeSylva* was a copyright case and the court had to determine what was meant in the federal statute when it referred to "children" as having certain rights. This Honorable Court looked to the state law for a definition of "children".

Obviously, in the case before this Honorable Court, we are not concerned with the definition of the word "heir", we are only concerned whether the antitrust law survives against the heir where suit was instituted long after the estate had been administered and its assets distributed to the heir and the Administrator released.

If the federal antitrust law provided that civil actions survived as to the heirs of a deceased wrongdoer, then this Court would have to define the word "heirs". but the federal antitrust statute does not so provide.

It should also be noted that this Honorable Court in *DeSylva* was very careful to state that it would not always look to state law even for definitions. The Court said on Page 582:

> "This does not mean that a State would be entitled to use the word "children" in a way entirely strange to those familiar with its ordinary usage, but at least to the extent that there are permissible variations in the ordinary concept of "children" we deem state law controlling."

In the *Spearman v. Spearman* case, 482 F. 2d 1203 (5th Cir. 1973), the Court said that *DeSylva v. Ballentine* "held that federal courts should look to state law *in defining* terms describing familial relations". (Emphasis Added)

In the instant case, the word "heir" is not used so there is no need to look to Louisiana law for a definition of this term.

Thus, petitioners' claims of conflict of decisions and departure from accepted and usual course of judicial proceedings collapses.

Nor is there an important question of federal law which has not been and should be decided by this Honorable Court. But more than that, the decision below is in full accord with the principals expressed in decisions of this Honorable Court.

As early as 1848, this Honorable Court decided that survival depends upon the federal or common law, not state law.

and that where there is survival, it is against the executor of the estate of the deceased. In *United States v. Daniel,* 6 How. 11, 12 L. Ed. 323, this Court said:

> "If the person charged has secured no benefit to himself at the expense of the sufferer, the cause of action is said not to survive; but where, by means of the offense, property is acquired which benefits the testator, there an action for the value of the property shall survive against the *executor.*" (Emphasis Added).

The Court of Appeals below properly held with more than sufficient authority that the federal statute which created petitioners' right of action made no provisions for abatement or survival and, therefore, recourse could only be had to the federal common law.

The federal common law does not provide for survival for actions arising ex delicto for wrongs committed when neither the wrongdoer nor his estate benefitted. *Sullivan v. Associated Billposters and Distributors,* 6 F. 2d 1000 (2nd Cir. 1925).

Sullivan quoted from 3 Blackstone's Comm. 302 as follows:

> "The death of either party is at once an abatement of the suit. And in actions merely personal, arising ex delicto (from wrong done), for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is

> that actio personalis moritur cum persona (a personal action dies with the person); and it shall never be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury."

Sullivan and all of the other authorities hold that even when an action survives, it only survives against the personal representatives, such as executors or administrators of the estate of the deceased.

The Court in *Sullivan* at Page 1003 of 6 F. 2d said:

> "The courts of equity recognized the injustice of the abatement of a suit by the death of a party. In Clarke v. Mathewson, 12 Pet. 164, 171, 9 L.Ed. 1041, Judge Story called attention to the difference between a suit in equity and an action at law because of the death of a party; and as a general rule the maxim "actio personalis moritur cum persona" has not applied to cases falling within the jurisdiction of equity, and equitable remedies exist to the same extent *against executors and administrators* as they did against the decedent. Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663; Wynn v. Tallapoosa County Bank, 168 Ala. 469, 53 So. 228; Harrigan v. Gilchrist, 121 Wis. 127, 99 N.W. 909. This explains why it is that in suits for infringement of patents, trademarks, and copyrights, where injunctions are sought and claims are made,

> the suits survive in favor of and against *personal representatives.*" (Emphasis Added)

We particularly emphasize that the federal law even prohibits the substitution of an heir for a deceased party defendant after the estate has been administered. Federal Code of Civil Procedure, Rule 25 (a), adopted 28 USC § 778, which was repealed when Rule 25(a) was adopted. That statute clearly provided that upon the death of a party only his executor or administrator could be substituted.

As further concrete evidence that it is the intention of Rule 25(a) to substitute only the succession representative, we call the Court's attention to the Notes of the Advisory Committee on Rules. Note 1 states that the "first paragraph of Rule 25(a) is based upon Equity Rule 45 (death of party-revivor) and 28 USC § 778 (death of parties; substitution of executors, administrators)".

The Notes pertaining to the 1963 Amendment of Rule 25 (a) (1) provides as follows:

> "A motion to substitute made within the prescribed time will ordinarily be granted, but under the permissive language of the first sentence of the amended rule ("The court may order") it may be denied by the court in the exercise of a sound discretion *if made long after the death*-as can occur if the suggestion of death is not made or is delayed-and circumstances have arisen rendering it unfair to allow substitution. Cf. Anderson v. Yungkau, supra, 329 U.S. at 485, 486, 67 S.Ct. at

> 430, 431, 91 L.Ed. 436, where it was noted under the present rule that *settlement and distribution of the estate of a deceased defendant might be so far advanced as to warrant denial of a motion for substitution even though made within the time limit prescribed by that rule.* Accordingly, a party interested in securing substitution under the amended rule should not assume that he can rest indefinitely awaiting the suggestion of death before he makes his motion to substitute." (Emphasis Added)

Certainly, if an heir can not be substituted for a deceased *party* defendant, then clearly, an heir can not be sued initially.

It should also be noted that the federal law provides that a civil action for damages by the United States shall not abate upon the death of a defendant but shall survive and be enforceable *against his estate.* (Emphasis added) 28 USC § 2404. Certainly, if the United States can not sue an heir, then a private citizen can not do so. The Court of Appeals properly agreed with this statement.

Petitioners pray this Court to give them, if there be judgment in their favor, not only the property of the deceased which the heirs inherited, but also the property of the heirs which they earned or may have inherited from someone other than the deceased. Petitioners cite the Louisiana Succession Law which does provide that if the heirs take possession without benefit of inventory, then everything that they may own is subject to judgment. Petitioners fail to mention

to the Court that the heirs only take possession of the estate without benefit of inventory when it is clear from the claims made within the period of time set forth in the law that the assets of the estate exceed the liabilities. Here the debts of the succession were minimal amounting to only unpaid current accounts. Under Louisiana law, this claim and any others prescribed long prior to the putting into possession.

Petitioners, as the Court of Appeals held, were well aware of the death of respondent's father and made no claim, formal or informal, against the estate during its two years and seven months of administration nor did they for an additional thirteen months thereafter. Nor did petitioners oppose the discharge of the Administrator as they could have under Louisiana law.

In short, petitioners ask this Court to apply some of Louisiana law but not the laws of prescription and other laws which together form the entire basis and reasoning behind the Succession Law of Louisiana. This is not really important in view of the clear authority that Federal Statutory and common law must be applied, not state law. Under the Federal Statutory laws, the federal common law,and the federal jurisprudence, an heir can not be sued initially particularly after the administration has been completed and the assets distributed.

The statement by petitioners on Page 30 of their petition that respondent's father used great legal political power "to amass a fortune" is not only untrue, but counsel for petitioners well know the untruthfulness of such statement. They, after receipt of the motion to dismiss the administrator on

on the grounds that the administration had been closed, then finally decided to look at the succession proceedings and determined its net worth and sum.

The Court of Appeals properly held that this action did not survive against the heirs particularly in this case where the suit was instituted long after the decedent's death and after his estate had been administered and distributed among his heirs and the administrator released. The Court further properly found that even if it looked to reasoned justice, petitioners' persistent failure to exercise their claimed rights, despite ample opportunity, did not warrant an extension of the survival of their cause of action.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I certify that three copies of the above and foregoing Brief were by me this 12th day of December, 1975, deposited in the United States Mail, first class, postage prepaid, addressed to Mr. F. Irvin Dymond and Mr. William L. Crull,III, counsel for Petitioners, properly addressed at their post office address of 1220 National Bank of Commerce Building, New Orleans, Louisiana 70112, and that all parties required to be served have been thus served this date.

SIDNEY W. PROVENSAL, JR.